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Supreme Court of the United States

No. .....

SOUTHLAND MANUFACTURING CORPORATION,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO REVIEW AND SET ASIDE DECISION OF UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

PETITION FOR WRIT OF CERTIORARI

Petitioner, Southland Manufacturing Corporation, petitions the Court for a writ of certiorari to the United States Court of Appeals for the District of Columbia. This petition is made with reference to the Court of Appeals' March 16, 1973 decision in *Southland Manufacturing Corporation* v. *National Labor Relations Board*, No. 71-2059, ... F.2d ..... (CA 4, 1973). Copy of said decision is appended hereto, together with copy of judgment.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sec. 1254(1), which provides that this Court may review cases in the courts of appeals "by writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

The judgment sought to be reviewed is dated and was entered or filed on April 20, 1973, and the statutory provision believed to confer on this Court jurisdiction to review the said judgment by writ of certiorari is 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED FOR REVIEW

(1) Was the original ruling of the National Labor Relations Board providing for backpay, which ruling was affirmed by the Court of Appeals, conditioned upon a resumption of business operations by Petitioner? If so, did the Court of Appeals err in granting enforcement to the backpay provisions of the Board's ruling?

(2) Was the Board's General Counsel guilty of *laches* to the prejudice of Petitioner?

(3) Did the Board's General Counsel fail to carry his burden to prove compensable loss of earnings by the discriminatees?

(4) Did the Board's General Counsel properly investigate, as required, the bases for the backpay specifications?

STATUTE INVOLVED

This case involves the National Labor Relations Act, 49 Stat. 449, reenacted in 61 Stat. 136, last amended by Act of September 14, 1959, P.L. 86-257, 86th Cong., 1st Sess.; 29 U.S.C., Chapter 7, subchapter II, Sec. 151-168

STATEMENT OF THE CASE

In 1966 the National Labor Relations Board issued its decision that Petitioner had violated Sections 8(a)(1), (3), and (5) of the National Labor Relations Act by wrongfully discharging an employee, refusing to reinstate striking

employees, and shutting down its plant. The Board's order relevant to reinstatement and back pay for employees involved reads as follows:

> We shall order the Respondent, *in the event it resumes its operations*, to offer Crimilda Acosta and to those striking employees, who were discriminatorily discharged or denied reinstatement immediate and full reinstatement to their former or substantially equivalent positions and make all such employees whole for any loss of earnings they may have suffered by reason of the unlawful discrimination against them; backpay to run only to the date in February 1965 when the Respondent shut down its plant, the exact date to be determined at the compliance stage. We shall also require the Respondent to make whole those nonstriking employees who were unlawfully locked out from December 7, 1964 to January 11, 1965. (Emphasis supplied.)

The Board's decision was affirmed by the Court of Appeals for the District of Columbia in *United Hatters, Cap & Millinery Workers, International Union* v. *NLRB*, 375 F.2d 325 (C.A. D.C., 1967). In 1971 the Board issued a Supplemental Decision and Order determining the amount of backpay for which Petitioner was ostensibly liable, and Petitioner thereafter sought review in the Court of Appeals to review and set aside that determination on four grounds: The joint backpay liability and reinstatement liability was contingent upon *Petitioner's* resumption of business operations; the Board was guilty of *laches* in instituting the proceedings; the Board failed to show compensable loss by the discriminatees; and the Board failed to follow its own guidelines for investigating backpay losses. Petitioner's petition for review was denied by the Court of Appeals below, and it is because of this denial that the present petition for writ of certiorari is sought.

The basis for jurisdiction in the Court of Appeals was the National Labor Relations Act, 29 U.S.C. Sec. 151 *et seq.* This petition for writ of certiorari should be granted because the Court of Appeals below has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

ARGUMENT

I.

The Board's Original Ruling For Reinstatement And Back Pay, Which Ruling Was Affirmed By The Court Of Appeals, Specifically And Expressly Conditioned Back Pay And Reinstatement Upon A Resumption Of Business Operations By Petitioner.

Prior to the Backpay Hearing of April 19, 1971, Petitioner filed with the Regional Director of the 24th Region a motion to dismiss specifications on the ground that the responsibility of the Petitioner for backpay was made contingent by the Board in its decision of April 1, 1966, which decision was affirmed unchanged by the Court of Appeals on February 23, 1967, upon Petitioner's resumption of business operations. *N.L.R.B.* v. *Southland Mfg. Corp.*, 375 F.2d 325 (1967). At the Backpay Hearing, the Trial Examiner, after some discussion of the motion, decided to take the motion "under advisement at this time" (App. 21).

An objective and enlightened consideration of the circumstances which existed at the time Trial Examiner Max Rosenberg originally heard the case, circumstances which were brought out in the unfair labor practices hearing before and which, therefore, were known to that Trial Examiner, and to the Board, make it crystal clear that the only rational way the Board could require the payment of backpay was for it to be dependent upon Southland's resto-

ration to a fiscal or business position which would make possible the accrual of sufficient funds for such an obviously large expenditure.

What were some of the facts known to the Trial Examiner and the Board which caused the Board to so qualify the provisions for backpay? The fact that all of Southland's government contracts had been cancelled by the Defence Supply Agency on December 21, 1964. That Southland had been directed to cease all work on those contracts as of December 22, 1964. That Southland had been allowed to resume work on those contracts on January 11, 1965 only for purposes of completing work in process at the time the plant closed on December 7, 1964. That Southland was being charged by the government with having defaulted on the said contracts and was, therefore, subject to potentially great liability for replacement and re-procurement damages. That Southland had been removed from the Qualified Manufacturers List and its application for reinstatement denied—which meant that Southland could not bid upon or be awarded any government contracts. That Southland had no outstanding government contracts of any kind. That Southland was substantially in debt to Pridco, a governmental leasing agency, for back rent on its plant facilities. That Southland was substantially in debt to the SBA for past loans. That Southland had terminated all operations in April, 1965. That the chief stockholder and manager of Southland, Morris J. Milstein, had clearly and emphatically indicated his intention not to attempt to re-open the plant. These truths are all in the transcript and record of the unfair labor practices hearings over which he presided. Mr. Rosenberg knew, without any equivocation, that Southland was a broken, debt-ridden, moribund corporation, whose chances of ever being able to rise from the ashes of its then-current ignominy to a state of health were minis-

cule, at most. For the Board to have ordered the absolute payment of backpay, even a small amount, would have been facetious.

Furthermore, note the language and punctuation of the Board's Order. "We shall order the Respondent, *in the event it resumes its operations*, to offer Crimilda Acosta and to those striking employees, who were discriminatorily discharged or denied reinstatement, immediate and full reinstatement to their former or substantially equivalent positions and make all such employees whole for any loss of earnings they may have suffered by reason of the unlawful discrimination against them; backpay to run only to the date in February, 1965 when Respondent shut down its plant, the exact date to be determined at the compliance stage. We shall also require the Respondent to make whole those non-striking employees who were unlawfully locked out from December 7, 1964 to January 11, 1965" (Decision and Order dated April 1, 1966, pp. 2 & 3). (Emphasis supplied.)

The grammatical construction of the quoted sentence is such as to make the dependent clause, "in the event it resumes its operations" as dependent or related to the subsequent independent clause relating to the backpay for discriminatees as to the independent clause appertaining to the offering of reinstatement to them. Note well, there is no punctuation of any kind—comma, semi-colon, etc.—between the independent clauses relating to reinstatement and backpay for discriminatees, which certainly indicates that the Board looked upon these matters as overlapping, or interrelated, elements of a single, indivisible idea. Therefore, a qualification of a part would be a qualification of the whole.

In its Order (Decision and Order dated April 1, 1966, p. 5), the Board qualified all backpay provisions by the provisions of the Remedy section already quoted herein.

By order dated February 23, 1967, the United States Court of Appeals For The District of Columbia enforced the backpay and reinstatement provisions of the April 1, 1966 Board Order without a single change. *N.L.R.B.* v. *Southland Mfg. Corp., Supra.* Hence, the Board Order, with the qualifications stated, remained in tact.

Since Petitioner has never resumed its business operations, the Court of Appeals below committed manifest error in denying Petitioner's petition for review, and in holding Petitioner liable for backpay. This conclusion is compelled by the plain and unambiguous language of the Board's ruling and order which has been affirmed by the Court of Appeals.

II.

The General Counsel Was Guilty Of Laches To Petitioner's Prejudice.

Respondent's second motion to dismiss the backpay specifications was on the ground of *laches* (App. 23). This motion, too, was taken under advisement by the Trial Examiner (App. 27).

In the case of *N.L.R.B.* v. *Mastro Plastics Corp.*, 354 F.2d 170 (2d Cir., 1965), cert. denied, 384 U.S. 972 (1966), the second Circuit Court of Appeals indicated that, where protracted delay on the part of the Board in instituting backpay proceedings is intentional or unreasonable, the aggrieved employer has a proper defense of *laches* to backpay obligations asserted against him by the Board. The Court also indicated that, when the defense of *laches* is raised, the Board has the burden of proving that its delay in instituting backpay proceedings was neither intentional nor unreasonable.

Now, to the particular facts of this case. The order of the Board was entered on April 1, 1966. It was not until almost one year later, on February 23, 1967, that an en-

forcement order was entered by the Court of Appeals. Backpay proceedings were not initiated until January 21, 1971, almost five years after the Board order and some four years after the enforcement order. Why did the Board defer the backpay hearing so long? Petitioner can only speculate, because the Board has not seen fit to afford it reasons for the delay, nor did the Board offer evidence to justify its lethargy at the April 19, 1971, backpay hearing. But Petitioner does not have to speculate as to the damages which its ability to defend itself in the backpay proceedings suffered as a result of the inordinate delay. Petitioner lost or misplaced many corporate records which would have been very helpful to it. Many of Petitioner's former employees moved their residences and were inaccessible for questioning and possible use as witnesses. The memories of remaining and accessible former employees relating to significant events in the history of this case had faded.

What element of policy would be served by the enforcement of backpay against and the payment of same by Southland now? Surely Southland is not an obstruction or impediment to the "free flow of commerce" now. Southland is definitely not an employer now, and, therefore, cannot interfere with or constitute a danger to those rights of labor and of the public which the Act purports to protect.

Manifestly, then, enforcement at this late date of backpay against Southland in these proceedings would in no way serve the public weal by effectuating the policy of the NLRA. Its only effect now would be punitive—to punish Southland and Mr. Milstein.

For the reasons stated herein, Respondent respectfully submits that the Backpay Specifications should be stricken and the backpay claim against it dismissed.

III.

The General Counsel Failed To Carry His Burden To Prove Compensable Loss Of Earnings By The Discriminatees.

Petitioner next moved to dismiss the backpay claims of all discriminatees who had failed to appear at the hearing and testify concerning earnings realized by them during the backpay periods, (App. 27). The motion was denied with leave to renew, (App. 27). The motion was renewed near the end of the hearing, (App. 44-45).

This motion evolved from the combination of two important factors at the hearing: (1) Petitioner had alleged interim earnings in his Answer and Amended Answer to Specifications; and (2) The General Counsel had rested its case without calling any of the discriminatees to testify (App. 23).

It should be noted here that, over the objection of the General Counsel, the Trial Examiner had previously refused to strike Petitioner's Amended Answer and left the same in the record (App. 22-23).

A related motion, made later in the hearing by Petitioner, should also be considered here, as the authorities which support the motion concerned with interim pay support this latter motion as well. The related motion to dismiss the specifications was on the ground that the discriminatees had failed to make a reasonable effort to obtain employment during the backpay period (App. 45). This motion was denied for the same reason as was the previous motion (App. 45).

Petitioner contends that the Trial Examiner was in error when he rejected Petitioner's offer of certain written evidence relative to the last foregoing motion. Specifically, the Trial Examiner incorrectly excluded these written answers on the ground that they were hearsay (App. 41). For

them to be hearsay, they would have to have been offered for the truth of the assertions contained in them, namely that the discriminatees did nothing about seeking other employment during the backpay period, except apply to their local Unemployment Office. This was not their purpose or function. Mr. Milstein had already testified as to what the discriminatees had said about their efforts to obtain other jobs, (App. 36-App. 39). This testimony was admitted, over the objection of General Counsel, and was never rejected by the Trial Examiner. These documents were offered to corroborate the testimony of Mr. Milstein, to prove that the responses testified to by Mr. Milstein had, in fact, been obtained—without regard to the truth or falsity of the assertions contained in the writings. The hearsay rule, therefore, clearly had no application to this evidence. For a complete understanding of what transpired at the hearing relative to Petitioner's offer of evidence on the question of the efforts of discriminatees to obtain other employment during the backpay period, the Court is referred to App. 33-41.

The basis on which the Trial Examiner rejected the two motions referred to at the beginning of this section of Petitioner's brief was that Petitioner had the burden of proof in both cases and that it had failed to carry that burden (App. 44-45). Petitioner respectfully submits that the burden of proof as to these issues was upon General Counsel. ". . . (W)e conclude that General Counsel had the burden of producing the testimony by *each discriminatee* that a willful loss of earnings was not incurred. . . ." *N.L.R.B.* v. *Mastro Plastics Corp., supra.* And further on in same case, the Court stated: ". . . (I)nformation relative to whether the discriminatees willfully incurred a loss in earnings is within the knowledge of the discriminatees, not the employer . . . Since one purpose of the backpay remedy is to

compensate them only for actual losses, *it is logically within the duty of the Board to produce at the hearing the evidence most relevant to the question—testimony by the discriminatees.* Furthermore, . . . it (the Board) is . . . the representative of the discriminatees. If the discriminatees had to sue in their own right for backpay, they would obviously have to testify. *Since the Board presumably has some prior contact with available discriminatees when it computes 'net backpay due' for specifications,* see 24 C.F.R. Sec. 102.53, it is more likely to know their whereabouts at the time of the hearing. We think it fair to require the Board to make them available.

". . . (W)e conclude that a rule requiring a discriminatee to testify before his award becomes final is not an undue burden on the Board and would not undermine the efficacy of the backpay remedy." *N.L.R.B.* v. *Mastro Plastics Corp., supra.* (Emphasis supplied.)

Patently, the General Counsel, having rested its case without producing a single witness (App. 23), did not satisfy its burden of proof.

But, had the Trial Examiner been correct in his ruling, and had the burden of proof as to these issues lain with Petitioner that burden would have been met by the evidence presented by Petitioner and accepted by the Trial Examiner. Mr. Milstein's testimony as to interim pay (App. 28-30) and as to willfully incurred loss of earnings was admitted by the Trial Examiner and was never rejected on any basis (App. 33-41). The Board presented no testimony or evidence to refute that of Petitioner. Ergo, the testimony of Petitioner stands as the truth on the matters to which it speaks.

Note: The vacation pay check for which Petitioner's Exhibit No. 1 was reserved at the backpay hearing is not available, being one of many records lost to Pe-

titioner due to the long delay by the General Counsel in instituting backpay proceedings. In place of the check, Petitioner submits, and asks the Court to consider in lieu of the said check certain accounting records of Southland Manufacturing Corp., marked Respondent's Exhibit No. 1-A and Respondent's Exhibit No. 1-B which reflect payment of vacation and Christmas pay during the backpay period.

True copies of the documents have been submitted to Ulysses T. Boyd, Esquire, Counsel for The General Counsel and to the charging party, in accordance with instructions of the Trial Examiner (App. 30).

IV.

The General Counsel Did Not Properly Investigate, As Required, The Bases For The Back Pay Specification.

Next, Respondent moved to strike the specifications on the ground that the General Counsel failed to follow its own guidelines by failing to make a proper thorough investigation of factors concerned in the compilation of the specifications (App. 43). This motion was denied (App. 44).

In support of this motion, Petitioner relied again on the admitted testimony of Mr. Morris J. Milstein relative to questions asked discriminatees at the beforementioned meeting of April 15, 1971. One of those questions was, to quote Mr. Milstein, "whether the National Labor Relations Board had at any time phoned or contacted them by a visit or in writing . . . asking if they worked anywhere," (App. 40), to which question "they all said 'No' except one . . ." (App. 40). This testimony was accepted by the Trial Examiner, again over the objection of General Counsel (App. 41), and only the written answers of the discriminatees—Respondent's Exhibits 2A through 2DD—

not their verbal or signalled answers, as observed and testified to by Mr. Milstein—were rejected (App. 41).

Petitioner takes the position that the Trial Examiner erred in rejecting these exhibits. The answers were not offered for the truth of the assertions contained in them, but for purposes of corroboration only.

The responses of the discriminatees, written and otherwise, revealed unequivocally that the General Counsel was derelict in the performance of its duties in the compilation of the specifications under consideration. Out of a random 31 discriminatees, only one indicated that he or she had been contacted relative to the specifications. Since the Board failed to present testimony or evidence to exonerate its methods and procedures in evolving the specifications, we can—must—reasonably assume that the total performance was as starkly inefficient as the record would indicate. In which case, no reasonable mind could suggest or believe that the specifications presented by the Board for acceptance as the guideline or outline for backpay liability in this case bear any slightest semblance to a reasonably accurate account.

In passing, it should be pointed out that the Board did offer all of the corroborative evidence which it, apparently, had of its compilation efforts. Social Security records (App. 42). On objection of counsel for Respondent, these recrds were rejected (App. 42-43).

At this point Petitioner moved "to dismiss or strike the specifications on the ground that the specifications failed to take into account the fact Southland was closed by order of The Defense Supply Agency from December 22, 1964 to January 11, 1965 and that thereafter Southland was in a position to rehire only for the purpose of completing work in process." (App. 44). This motion was denied by the Trial Examiner on the ground that it was based on evidence which had been rejected (App. 44).

Indeed, the Trial Examiner had ruled inadmissible the testimony of Mr. Milstein pertaining to this subject (App. 34-35 and App. 31-32). But, he had admitted a narrative statement of counsel for Petitioner of the facts to which Respondent would have testified, if he had been allowed (App. 35-36). This statement was admitted so that the Board could consider it in deciding the backpay issue (App. 36). It would logically follow, therefore, that Petitioner's motion should not have been denied, but taken under advisement for consideration by the Board.

The Trial Examiner was correct when he stated that the issue involved in the motion had already been heard by the Board at the time of the original unfair labor practices hearings. But, the Board, in its April 1, 1966 order had, obviously, either overlooked the fact that Petitioner had been shut down by The Defense Supply Agency during the period of December 22, 1964, to January 11, 1965, or had not believed that to be the fact. In either event, the Board was incorrect, because all of Petitioner's contracts were, in fact, cancelled by the DSA on December 22, 1964; consequently, Petitioner could do no more work on them. Petitioner had no other business to do; so, he could not use the discriminatees. This information was testified to by Mr. Milstein in the unfair labor practices hearing. Under such circumstances, Southland could not possibly be held liable for backpay. *Phillips* v. *Granite Co.* (1939) 11 N.L.R.B. 910; *Titmus Optical Co.* (1938) 9 N.L.R.B. 1026; *American Radiator Co.* (1938) 7 N.L.R.B. 1127; *Lowy, etc.* (1937) 3 N.L.R.B. 938; *Salmon & Cowin* v. *N.L.R.B.* (CA-5, 1945, 148 F.2d 941); *Rochat Co.*, 163 N.L.R.B. No. 49 (1967).

CONCLUSION

For the foregoing reasons, the Board and Court of Appeals should be reversed and the backpay specifications dismissed.

Respectfully submitted,

L. WAYNE TOWNSEND
1233-34 Central National Bank Bldg.
Richmond, Virginia 23219
Counsel for Petitioner

CERTIFICATE

I hereby certify that 2 copies of the foregoing Petition for Writ of Certiorari were sent by regular mail, postage prepaid, to Marcel Mallet-Prevost, Assistant General Counsel, National Labor Relations Board, Office of the General Counsel, Washington, D. C. 20570, this 18th day of July, 1973.

MILTON P. MILLER
1508 WILLOW LAWN DRIVE
RICHMOND, VIRGINIA 23230
COUNSEL FOR PETITIONER

DECISION

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

UNITED STATES COURT OF APPEALS

No. 71-2059

SOUTHLAND MANUFACTURING CORPORATION, PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT.

Petition for Review and Cross-Application for Enforcement of order of the National Labor Relations Board

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Decided March 16, 1973

L. Wayne Townsend was on the brief for petitioner.

Peter G. Nash, General Counsel, *Marcel Mallet-Prevost*, Assistant General Counsel, *Baruch A. Fellner*, *John M. Flynn*, Attorneys for the National Labor Relations Board, were on the brief for respondent.

Before FAHY, *Senior Circuit Judge*, MCGOWAN, and LEVENTHAL, *Circuit Judges*.

PER CURIAM: In 1966 the National Labor Relations Board issued its decision that Southland Manufacturing Corporation had violated Sections 8(a)(1), (3), and (5) by wrongfully discharging an employee, refusing to reinstate striking employees, and shutting down its plant. The Board

ordered the company to pay back pay and reinstate the discriminatees. That decision was affirmed by this court in *United Hatters, Cap & Millinery Workers, International Union v. NLRB*, 375 F.2d 325 (D.C. Cir. 1967). In 1971 the Board issued a Supplemental Decision and Order determining the amount of backpay for which Southland is liable, and this case is before us on a petition to review and set aside that determination.

Southland raises four objections to the Board's Supplemental Decision: The backpay liability was contingent upon resumption of business operations; the Board was guilty of laches in instituting the proceedings; the Board failed to show compensable loss by the discriminatees; and the Board failed to follow its own guidelines for investigating backpay losses. We find none of these warrants reversal.

1. The portion of the Board's order relevant to Southland's contingency argument reads as follows:

> We shall order the Respondent, in the event it resumes its operations, to offer Crimilda Acosta and to those striking employees, who were discriminatorily discharged or denied reinstatement immediate and full reinstatement to their former or substantially equivalent positions and make all such employees whole for any loss of earnings they may have suffered by reason of the unlawful discrimination against them; backpay to run only to the date in February 1965 when the Respondent shut down its plant, the exact date to be determined at the compliance stage. We shall also require the Respondent to make whole those nonstriking employees who were unlawfully locked out from December 7, 1964 to January 11, 1965.

Southland has not resumed its operations, and it contends that the above passage makes its liability for backpay, in

respect of periods both before and after its shutdown in February, 1965, contingent upon such resumption. It further notes that this court affirmed the above order, and concludes that the Board cannot now assess backpay without the occurrence of the contingency.

Each party asserts that a strict grammatical construction of the order supports its reading of the modifying clause 'in the event it resumes its operations." Neither argument is compelling, although Southland's reading has some advantage insofar as purely grammatical indications of meaning are thought to be determinative. The modifying clause precedes both dependent clauses. Were it intended to modify only the "reinstatement" clause, proper placement would be within the clause. Nevertheless, this argument is not conclusive.

The court's previous reference to the order sheds little light on the contingency issue:

> The remedial order, in addition to cease and desist provisions, called affirmatively for reinstatement of certain named employees in the event the company, which at the time of the order had ceased operations, resumed operations, with reimbursement for any loss of earnings suffered as a result of the discrimination against them. . . .

375 F.2d at 326.

We did, however, note with approval the Board's reservation of the right to modify the backpay provisions as required in the future. Thus we showed no purpose in affirming the order to confine the Board to the terms of this alleged contingency in the supplemental proceedings. It does not seem rational to suppose that either the court or the Board contemplated that Southland could escape liability for backpay in respect of periods prior to its going out of business.

2. Southland's second argument is that the Board was guilty of laches in instituting the backpay proceeding. The initial order was entered on April 1, 1966, and this court issued an enforcement order on February 23, 1967. The backpay proceedings began January 21, 1971. Petitioner claims prejudice because, in the meanwhile, records were allegedly lost by petitioner, possible witnesses moved away, and the memories of former employees faded. It cites no specific examples of any of these disadvantages. It called no witnesses other than its president; therefore, the claim concerning the faded memories of former employees is questionable.

The Board answers that laches may not defeat a suit brought by the Government to enforce a public right. In any event, the Board points out that the delay is largely attributable to the intervening proceedings held to determine whether it was Southland or its alleged successor (Propper International, Inc.) which was to be held accountable for the back pay. Affirmance as to this point can rest comfortably on this last-mentioned circumstance.

3. The problem of the adequacy of the Government's proof is complicated by the sketchy nature of the hearing. Prior to the hearing the Board had, in accordance with its usual practice, filed a detailed specification of the back pay which it had found to be due each individual employee. This specification lists the employees by name and sets forth other relevant information, including the amounts of interim earnings, if any, which are deducted from the amount owing by Southland. These interim earnings are obtained by the Board from the Social Security records.

In its amended answer, Southland stated first that it could not admit or deny the accuracy of the specifications for lack of knowledge as to how the Board formulated them.

It did go on to say, however, that its President, Mr. Milstein, "has knowledge of interim earnings and compensation by some of the employees named in the schedules of the specifications which are not reflected in those specifications"; and it went on to say that it expected to be able to produce records as to those alleged interim earnings and compensations at the hearing.[1]

It is to be noted that these allegations in the amended answer relate to interim earnings. There is no suggestion whatsoever by the defense of willful loss of earnings, which is the shorthand way of referring to the fact that an employee makes no effort to find other employment. At the hearing Mr. Milstein was the only witness for Southland. He testified about the vacation pay and December wages referred to in Note 1. He also testified that he had talked to some of the employees, and had ascertained from them that they did nothing more about seeking employment than to register with the United States Employment Service. Although the Examiner let this in over the General Counsel's objection, it obviously was improper testimony since it went to a defense not even hinted at in the amended answer. Mr. Milstein further testified that he had asked these 30-odd employees whether they had been approached by the Board for information in connection with the ascertainment of interim earnings, and that they had indicated they had not been. It is this testimony on which Southland relies in urging that the Board did not follow its own prescribed procedures.

[1] It is also alleged that many of the employees had received vacation pay, and that some had received wages during the period from December 7 through December 21, 1964, and that, as to these matters, Southland expected to be able to produce probative records at the hearing. The Board found ultimately—and we agree—that, as to these particular claims, Southland did not carry its burden of proof. *See* footnote 4 of the Board's Supplemental Decision and Order.

This was the sum of Southland's challenge to the specifications at the hearing, and it was not of such a nature to warrant upsetting the Board's order in this case. The Board proceeded in a proper fashion, and, by means of the specifications, put Southland clearly on notice of what the Board's investigation showed to be due to each employee in respect of back pay, taking account of interim earnings known to the Board. If Southland had any reason to challenge any one of these computations, it should have done so with a statement of why it thought it was incorrect; and, in that event, it is entirely possible that the Board might have been under the necessity of producing the employee in question or otherwise sustaining its burden of proof. *See NLRB v. Rice Lake Creamery Co.*, 365 F.2d 888 (D.C. Cir. 1966); *NLRB v. Mastro Plastics Corp.*, 354 F.2d 170 (2d Cir. 1965). In the circumstances of this record, however, the Board was not required to have every employee present personally at the hearing to testify.[2]

4. On the basis of Milstein's testimony that a few of the employees had indicated to him that the Board had not approached them directly about interim earnings, Southland alleges that the Board failed to follow its own investigatory procedures in this case. That evidence standing alone is insufficient to require disturbance of the Board's order.

The Petition for Review is Denied.

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[2] *Rice Lake* and *Mastro Plastics* involved the issue of willful loss of earnings, a defense not raised in the pleadings in this case. Although the reasoning of those decisions may apply to the question of interim earnings as well, we reserve that question for consideration in a case where the defense of interim earnings has been asserted with the requisite specificity.

JUDGMENT

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-2059

Southland Manufacturing Corporation,
Petitioner,

v.

National Labor Relations Board,
Respondent.

Judgment

Before: Fahy, Senior Circuit Judge, McGowan, and Leventhal, Circuit Judges.

This Cause is before this Court upon the petition of Southland Manufacturing Corporation, to review a certain order of the National Labor Relations Board issued against it on October 29, 1971, and upon the cross-application of the National Labor Relations Board to enforce said order. This Court having carefully considered the briefs and transcript of record filed in this cause, and being fully advised in the premises, handed down its opinion on March 16, 1973, denying the petition for review and granting enforcement of the Board's order. In conformity therewith, it is hereby

Ordered And Adjudged by the United States Court of Appeals for the District of Columbia Circuit that the said order of the National Labor Relations Board in said proceeding be enforced, and that Southland Manufacturing

Corporation, its officer agents, successors and assigns abide by and perform the directions of the Board in said order contained.

/s/ Charles Fahy
Senior Circuit Judge, United States Court of Appeals for the District of Columbia Circuit

/s/ Carl McGowan
Circuit Judge, United States Court of Appeals for the District of Columbia Circuit

/s/ Harold Leventhal
Circuit Judge, United States Court of Appeals for the District of Columbia Circuit

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-141

SOUTHLAND MANUFACTURING CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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1. In February 1967, the court of appeals sustained the Board's findings that Southland Manufacturing Corporation violated Sections 8(a)(1), (3), and (5) of the National Labor Relations Act by discharging employee Crimilda Acosta on June 8, 1964, by refusing to reinstate her and 49 other striking employees upon their unconditional offers to return to work in October 1964, and by shutting down its plant and unlawfully locking out 300 employees from December 7, 1964 to January 11, 1965. *United Hatters, Cap and Millinery Workers International Union, AFL-CIO* v. *National Labor Relations Board*, 375 F. 2d 325 (C.A.D.C.), enforcing 157 NLRB 1356. The Board's order, which the court enforced, directed the Company, *inter alia*, to reimburse Acosta, the other unlawfully discharged striking em-

ployees, and the employees who were unlawfully locked out for any loss of pay resulting from the unfair labor practices committed against them. However, as it appeared that the Company had substantially curtailed its business activities for economic reasons, the portion of the order concerning the reinstatement of the striking employees was made contingent upon the Company's resumption of its operations.[1] The Company never fully

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[1]The Board stated (157 NLRB at 1357-1358):

> We shall order the Respondent, in the event it resumes its operations, to offer to Crimilda Acosta and to those striking employees, who were discriminatorily discharged or denied reinstatement, immediate and full reinstatement to their former or substantially equivalent positions and make all such employees whole for any loss of earnings they may have suffered by reason of the unlawful discrimination against them; backpay to run only to the date in February 1965 when the Respondent shut down its plant, the exact date to be determined at the compliance stage. We shall also require the Respondent to make whole those nonstriking employees who were unlawfully locked out from December 7, 1964, to January 11, 1965.
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> * * * *
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> We also expressly reserve the right to modify the backpay and reinstatement provisions * * * if made necessary by a change of conditions in the future, and to make such supplements thereto as may hereafter become necessary in order to define or clarify their application to a specific set of circumstances not now apparent.

The Board's order required the Company, *inter alia*, to (157 NLRB at 1359):

> (a) Make whole Crimilda Acosta, all striking employees whose names appear in the attached Appendix B, and all employees who were locked out on December 7, 1964, for any loss of pay they may have suffered by reason of the discrimination practiced against them, in the manner set forth in the section of the Trial Examiner's Decision entitled "The Remedy," as modified by our Decision herein.
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> (b) Create a preferential hiring list containing the names of Crimilda Acosta and all striking employees included in paragraph 2(a), above, as being entitled to reinstatement if and when Respondent reopens its plant. * * *

resumed its business and an alleged successor, Propper International Inc., acquired certain of the Company's facilities and commenced a substantially similar operation (Pet. Add. 4). Thereafter, following supplemental proceedings, the Board, in November 1970, decided that Propper was not a successor to the Company, and that the Company remained solely responsible for complying with the provisions of the Board's order. *Southland Manufacturing Corp. and Propper International Inc.*, 186 NLRB 792 (A-1. 1-3).[2]

2. The Board, on January 22, 1971, then issued a specification setting forth the backpay claims of the 350 employees (A-1. 4-9). In its amended answer, the Company merely alleged that the backpay specification did not reflect that "some of the employees" had received additional "interim earnings and compensation," and that certain unspecified employees had received "vacation pay" and "wages" (A-1. 12-13, 51-53, 66). At the hearing held on April 19, 1971, the Company for the first time raised the affirmative defense of willful loss of earnings and moved to dismiss the specification on the grounds that the Company's backpay liability was wholly contingent upon its resumption of operations, and that the Board was guilty of laches, had failed to follow its own procedures in compiling the specification, and had disregarded the Company's inability to comply with the affirmative provisions of the remedial order (A-1. 53-57).

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[2]"A-1." refers to the first volume of the appendix to the briefs in the court below. Copies of both volumes have been lodged with the Clerk.

The Board ruled that the Company's answer lacked the specificity required by Section 102.54(b)[3] of the Board's Rules and Regulations to raise the issues of interim earnings or willful loss of earnings. The Board also rejected the Company's contention that the Board's original order relieved it of any backpay obligation unless it resumed operations (A-1. 52, 55, 66, n. 3). The Board ordered the Company to pay the sum of $132,305, with interest (A-1. 57-58).

3. The court of appeals upheld the Board's backpay award (Pet. Add. 1-6). It concluded that, whatever the correct "strict grammatical construction" of the language used by the Board in its original order, the Board had reserved "the right to modify the backpay provisions as required in the future," and that it had acted properly in clarifying, in its supplemental order, the Company's backpay liability. "It does not seem rational," the court added, "to suppose that either the court or the

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[3]In relevant part, 29 C.F.R. 102.54(b) and (c) provide as follows:

> (b) * * * As to all matters within the knowledge of the respondent, including but not limited to the various factors entering into the computation of gross back pay, a general denial shall not suffice. As to such matters, if the respondent disputes either the accuracy of the figures in the specification or the premises on which they are based, he shall specifically state the basis for his disagreement, setting forth in detail his position as to the applicable premises and furnishing the appropriate supporting figures.
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> (c) * * * If the respondent files an answer to the specification but fails to deny any allegation of the specification in the manner required by paragraph (b) of this section, and the failure so to deny is not adequately explained, such allegation shall be deemed to be admitted to be true, and may be so found by the Board without the taking of evidence supporting such allegation, and the respondent shall be precluded from introducing any evidence controverting said allegation.

Board contemplated that Southland could escape liability for backpay in respect of periods prior to its going out of business" (Pet. Add. 3). The court also rejected the Company's contention of laches in light of the fact that an intervening proceeding was necessary to determine liability of the alleged successor (Pet. Add. 4); and it agreed with the Board that the Company's "challenge to the specifications * * * was not of such a nature to warrant upsetting the Board's order in this case" (Pet. Add. 6).

4. The issues raised in the petition turn on the circumstances of this particular case—which we submit were correctly determined by the court below—and there is no conflict in the circuits. Accordingly, further review is not warranted.

Petitioner does not challenge the Board's power to award backpay in the circumstances; rather, it merely contends that the Board did not intend to do so in this case. As the court below correctly pointed out, however, the Board's supplemental decision clearly indicated its intent to order the customary backpay award here. Nor can the Company successfully complain about the Board's backpay specification. The Board's specification "put Southland clearly on notice of what the Board's investigation showed to be due to each employee in respect of back pay, taking account of interim earnings known to the Board. If Southland had any reason to challenge any one of these computations, it should

have done so with a statement of why it thought it was incorrect * * * " (Pet. Add. 6).

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

PETER G. NASH,
General Counsel,
National Labor Relations Board.

AUGUST 1973.